Supreme Court, U.S.
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No. 91-1553

IN THE

Supreme Court Of The United States

October Term, 1992

BILLY JOE CAMP,

Appellant,

v.

PAUL CHARLES WESCH, et al.,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

MOTION OF APPELLEE GUY HUNT TO DISMISS OR AFFIRM

Charles J. Cooper
(Counsel of Record)
Michael A. Carvin
Robert J. McAuliffe
Elizabeth A. Cullen
Shaw, Pittman, Potts & Trowbridge
2300 N St., N.W.
Washington, D.C. 20037
(202) 663-8346

Algert S. Agricola, Jr.
2000 Interstate Park Center, Suite 204
Montgomery, Alabama 36109
(205) 272-3003

Attorneys for Appellee
Governor Guy Hunt

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

QUESTION PRESENTED

Whether the three-judge court erred in adopting, after a full hearing, its own Congressional redistricting plan for interim use in the 1992 elections in preference to a subsequently enacted plan of the Alabama State Legislature that has recently been denied preclearance by the Attorney General as violative of Section 5 of the Voting Rights Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT	1
ARGUMENT	4
CONCLUSION	8
APPENDIX	1a
Letter from John R. Dunne, Assistant Attorney General of the Civil Rights Division of the U.S. Dept. of Justice to the Honorable Jimmy Evans, Attorney General of the State of Alabama (March 27, 1992)	1a
ORDER, Wesch v. Hunt (Civil Action No. 91-0787, January 27, 1992)	1b

TABLE OF AUTHORITIES

Cases:	**Page**
Allen v. State Board of Elections, 393 U.S. 544 (1969)	4, 5
Camp v. Wesch, No. A-700 (U.S. March 27, 1992) (No. 91-1533)	3
Clark v. Roemer, __U.S.__, 111 S. Ct. 2096 (1991)	4, 5, 6
Connor v. Waller, 421 U.S. 656 (1975)	4
Hathorn v. Lovorn, 457 U.S. 255 (1982)	4
McDaniel v. Sanchez, 452 U.S. 130 (1981)	6
Perkins v. Matthews, 400 U.S. 379 (1971)	5
United States v. Board of Supervisors of Warren County, 429 U.S. 642 (1977)	4
Upham v. Seamon, 456 U.S. 37 (1982)	5, 7
Watkins v. Mabus, __U.S.__, 112 S. Ct. 412 (1991)	5
Wesch v. Hunt, No. 91-0787 (S.D. Ala. Jan. 27, 1992) (order)	2
Wesch v. Hunt, No. 91-0787 (S.D. Ala. March 9, 1992) (final judgment)	2
Wesch v. Hunt, No. 91-0787 (S.D. Ala. March 9, 1992) (mem.)	2, 3
Statutes and Regulations:	
Voting Rights Act of 1965, § 5, 42 U.S.C. 1973c	*passim*
28 C.F.R. app. § 51	3
Miscellaneous:	
Letter from John R. Dunne, Assistant Attorney General of the Civil Rights Division of the U.S. Dept. of Justice to the Honorable Jimmy Evans, Attorney General of the State of Alabama (March 27, 1992)	3
Supreme Court Rule 18.6	1

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Pursuant to Rule 18.6 of the Rules of this Court, Appellee Governor Guy Hunt moves that the appeal be dismissed or that the judgment of the district court in this case be affirmed.

STATEMENT

The Alabama Legislature received the 1990 census data on February 8, 1991. J.S. App. 135a. It ended its regular 1991 session on July 29, 1991 without having enacted a Congressional redistricting plan. J.S. App. 140a. At no time did Governor Hunt promise or agree to call a special session of the legislature to enact a Congressional redistricting plan.

Because the legislature failed to enact a Congressional plan during its 1991 regular session, and because there was little or no likelihood that the legislature would adopt a valid plan in time for use in the June 2, 1992 primary or 1992 election, a complaint was filed in *Wesch v. Hunt*, No. 91-0787 (S.D. Ala. filed Sept. 23, 1991) (J.S. App. 257a-262a), challenging the constitutionality of the existing malaportioned Congressional districts and urging the three-judge district court to adopt an interim plan for the 1992 election.

The *Wesch* case was tried on January 3-4, 1992, at which time no legislative plan was available. Several parties participated in the trial and six plans were offered for the three-judge court's consideration. J.S. App. 141a.

The court appointed its own expert, Dr. Harold W. Stanley, to review the proposed plans and to recommend a course of action. Dr. Stanley, upon instructions from the panel, filed a report to the panel suggesting that the court adopt a modified version of one of the plans presented during the hearing. *Wesch v. Hunt*, No. 91-0787 (S.D. Ala. Jan. 27, 1992) (order adopting Congressional redistricting plan described in the Stanley report dated January 22, 1992) (Appendix 1b-2b).

The legislature did not enact a plan until March 5, 1992. Four days later, the panel issued its final judgment accompanied by a lengthy memorandum opinion. *Wesch v. Hunt*, No. 91-0787 (S.D. Ala. March 9, 1992) (final judgment) (J.S. App. 5a-134a); *Wesch v. Hunt*, No. 91-0787 (S.D. Ala. March 9, 1992) (mem.) (J.S. App. 135a-173a). Recognizing the exigent circumstances, the court adopted its own plan to be implemented only if the legislature's plan did not receive preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, by March 27, 1992. The panel's rationale for the March 27, 1992 deadline was as follows:

> We find that, at a minimum, district lines should become fixed one week prior to the April 3, 1992

> qualifying date for candidates to allow both candidates and election officials the necessary time to evaluate them and choose their future conduct accordingly.

Id. at 135a, 152a (mem.). The legislature's plan was submitted to the Justice Department for preclearance on March 10, 1992.

Under 42 U.S.C. 1973c, reapportionment plans in jurisdictions covered by Section 5 must be precleared by the United States District Court for the District of Columbia or by the Attorney General. To obtain preclearance, the covered jurisdiction must demonstrate that the change will "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ." 42 U.S.C. 1973c. Alabama is a covered jurisdiction. 28 C.F.R. app. § 51.

On March 27, 1992, the Justice Department denied Section 5 preclearance to the legislature's plan on the grounds that it unnecessarily fragmented the black voting population among a number of districts. Letter from John R. Dunne, Assistant Attorney General of the Civil Rights Division of the U.S. Dept. of Justice to the Honorable Jimmy Evans, Attorney General of the State of Alabama (March 27, 1992) (Appendix 1a - 4a).

On March 13, 1992 appellant filed a notice of appeal to this Court (J.S. App. 1a). On March 19, 1992 appellant submitted both an application to this Court to stay the judgment of the three-judge court pending resolution of the appeal, and a motion for expedited consideration of the jurisdictional statement. On March 27, 1992 this Court denied appellant's request for an emergency stay and his motion for expedited consideration of the jurisdictional statement. *Camp v. Wesch*, No. A-700 (U.S. March 27, 1992) (No. 91-1533).

ARGUMENT

Appellant filed his jurisdictional statement prior to the Attorney General's decision, on March 27, 1992, to deny preclearance to the Congressional redistricting plan enacted by the Alabama Legislature. The Attorney General's denial of preclearance removes any possible basis for noting probable jurisdiction or otherwise questioning the propriety of the three-judge court's decision to adopt its own interim redistricting plan. Accordingly, this Court should either dismiss Secretary Camp's appeal for want of a substantial federal question or affirm the decision of the three-judge district court below.

Prior to the Attorney General's denial of preclearance, appellant argued that the three-judge court committed reversible error by not adopting the legislature's plan as its own interim redistricting plan for the 1992 Congressional elections. The Attorney General's determination that the legislature's plan violated Section 5's substantive mandate, however, entirely eliminates that plan as a legally permissible basis for conducting Congressional elections, much less a mandatory remedial alternative which the court below was required to adopt.

It is black letter law, recently reaffirmed by this Court, that redistricting and other "voting change[s] in a covered jurisdiction 'will not be effective as law[s] *until and unless cleared*'" under the methods prescribed by Section 5. *Clark v. Roemer*, __U.S.__, 111 S. Ct. 2096, 2101 (1991), quoting *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam) (emphasis added). Further, the "[f]ailure to obtain either judicial or administrative preclearance 'renders the change unenforceable.' " *Clark*, 111 S. Ct. at 2101, quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269, *reh'g denied*, 458 U.S. 1131 (1982). *Accord Connor*, 421 U.S. 656; *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969). Indeed, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an

injunction prohibiting the State from implementing the changes." *Clark*, 111 S. Ct. at 2101; *see also*, *Allen*, 393 U.S. at 572. Accordingly, the Court in *Clark* unanimously reversed a decision by a three-judge district court which declined to enjoin judicial elections held pursuant to unprecleared voting changes. *Id.*

This rule applies with particular force here since the legislature's plan is not simply awaiting Section 5 preclearance, but has been affirmatively denied preclearance because it had not been shown to be free from a "racially discriminatory purpose and . . . a racially discriminatory effect[,]" due to fragmentation of the black population. Appendix 3a. A redistricting plan that has been denied Section 5 preclearance because it is racially discriminatory simply cannot be used as a basis for holding Congressional elections. *Clark*, 111 S. Ct. at 2102; *Perkins v. Matthews*, 400 U.S. 379, 396-397 (1971); *Upham v. Seamon*, 456 U.S. 37 (1982). This Court made this principle abundantly clear in approving a three-judge court's adoption of a decade-old and concededly constitutionally infirm redistricting plan in preference to a legislative plan that had been denied Section 5 preclearance. *See Watkins v. Mabus*, __U.S.__, 112 S. Ct. 412 (1991) (affirming three-judge court's adoption of the unconstitutionally malapportioned 1982 legislative plan on an interim basis over the alternative of using a recently enacted plan which had been denied preclearance).

Here, appellant seeks to reverse completely the holding and logic of *Clark* by having this Court *require* a three-judge district court to order that elections be held under a redistricting plan that the Attorney General has found to violate Section 5 because it "fragment[s] . . . black population in areas of the state outside of the proposed black majority district . . . [due] to the desire to protect incumbent members or to serve parochial political interests." Appendix 3a. Such a request cannot be squared with the plain language of Section 5 or this Court's precedents.

In any event, the three-judge court's adoption of the legislature's plan cannot possibly solve the harm of which appellant complains. If the district court were required to adopt the plan produced by a policy-making body such as the Alabama Legislature, the court itself clearly would be required to submit this plan for Section 5 preclearance before implementing it. *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981). Any such subsequent submission by the three-judge court would also be denied preclearance and thus could not be used for the upcoming elections.

Nor does this case present the kind of extraordinary emergency circumstances that might possibly justify use of a non-precleared plan on the eve of an election. *See Clark*, 111 S. Ct. at 2101. The choice here is not between an unprecleared plan and an unacceptable or unreviewed alternative, but between a plan that has been affirmatively denied preclearance and one that has been found by the district court, after a full evidentiary hearing, to satisfy all legal requirements. Indeed, it was precisely to avoid having to choose between the unpalatable alternatives of no plan and an unprecleared or rejected plan that the court devised its own plan for use in the 1992 election if the State could not obtain preclearance of a legislatively enacted plan in time for the upcoming election. Moreover, the Court's ruling in *Watkins* demonstrates the extent to which a three-judge court must go to avoid, even in exigent circumstances, relying on a plan that has been denied preclearance. In short, there is absolutely no support for appellant's extraordinary claim that the three-judge court below should choose a legislative plan that violates Section 5 over the valid alternative that it has adopted after months of litigation.[1]

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[1] Nor can the three-judge court modify the legislature's plan to satisfy the Justice Department's Section 5 objections. The Attorney General objected to the legislature's plan on the grounds that it fragments the state's concentrated black population "among a number of districts none of which

Footnote continued on next page.

Accordingly, the three-judge district court's decision to adopt its own Congressional redistricting plan on an interim basis is the only appropriate remedial course in the face of upcoming elections and the absence of a legislative redistricting plan that has been precleared under Section 5.

Footnote continued from previous page.

has a black population of as much as 30 percent" rather than creating "two Congressional districts with black voting age population majorities." Appendix 2a. Revising the legislature's plan to create two black majority districts would require very substantial revisions of at least four of the seven districts. This would obviously leave virtually nothing of the original legislative plan. The Justice Department's objection to the legislative plan is thus so fundamental that, unlike the plan in *Upham*, it simply would not be possible to use the legislative plan as a basis for a modified plan.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Dated: April 23, 1992

Respectfully submitted,

Charles J. Cooper
(Counsel of Record)
Michael A. Carvin
Robert J. McAuliffe
Elizabeth A. Cullen
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N St., N.W.
Washington, D.C. 20037
(202) 663-8346

Algert S. Agricola, Jr.
2000 Interstate Park Center
Suite 204
Montgomery, Alabama 36109
(205) 272-3003

Attorneys for Appellee
Governor Guy Hunt

U.S. Department of Justice
Civil Rights Division
Office of the Assistant Attorney General
Washington, D.C. 20530

March 27, 1992

Honorable Jimmy Evans
Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Mr. Attorney General:

This refers to Act No. 92-63 (1992), which provides the redistricting plan for Congressional districts and Act No. 92-152 (1992), which provides for a change in the qualifying deadline for the June 2, 1992, primary election for members of Congress for the State of Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the Congressional redistricting submission on March 11, 1992; supplemental information was received on March 12, 17, 18, 23, 24, 25, and 26, 1992. The submission of the change in qualifying deadline was received on March 26, 1992.

With respect to the change in qualifying deadline, the Attorney General does not interpose any objection to the change. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5, 28 C.F.R. 51.41 and 51.43.

With respect to the far more complex Congressional redistricting, we note at the outset the extreme time constraints imposed by the order of the Court in *Wesch v. Hunt*, No. 91-0787 (S.D. Ala. March 9, 1992), which allowed the state until noon today to obtain preclearance of its proposed plan under Section 5. For that reason, our review to date necessarily has been limited, and similarly, the short time available has limited the state's ability to meet its burden under Section 5. To the extent possible, however, we have given careful consideration to the materials and information you have so diligently made available to us.

As you are aware, a concern has been raised that an underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit black voting potential to a single district. The proposed plan provides for one such district based on black population concentrations in Jefferson County, Montgomery County and intervening areas. The remainder of the state's concentrated black population, however, is fragmented under the submitted plan among a number of districts none of which has a black population of as much as 30 percent. In light of the prevailing pattern of racially polarized voting throughout the state, it does not appear that black voters are likely to have a realistic opportunity to elect a candidate of their choice in any of the districts.

Our analysis further indicates that the fragmentation of black population concentrations outside of the one district with a black voting age population majority was unnecessary. Indeed, it is clear that at least the outlines of alternative plans that avoided such fragmentation were available or readily discernible by state officials and that such alternatives would provide for two Congressional districts with black voting age population majorities. These included plans with one district based on the black communities of Montgomery and Mobile Counties and the intervening and adjacent black-populated areas, and the

other based upon the black population of Jefferson County and southern Tuscaloosa County, together with black-populated areas to the south and west. Moreover, it appears that the elimination of this identified fragmentation would enhance the ability of black voters to elect representatives of their choice.

The fragmentation of black population in areas of the state outside of the proposed black majority district, under these circumstances, has not been adequately explained. The reasons for this fragmentation appear to be related to the desire to protect incumbent members or to serve parochial political interests. While such considerations in themselves are not inappropriate, they may not be accomplished at the expense of the rights of black voters. *Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

Under Section 5, as noted above, the state has the burden of demonstrating that a proposed change was not adopted with a racially discriminatory purpose and that it will not have a racially discriminatory effect. In addition, a redistricting plan may not be precleared if the plan clearly violates Section 2 of the Act, 42 U.S.C. 1973. See the Section 5 Procedures, 28 C.F.R. 51.55(b)(2).

Under the circumstances discussed above, and particularly in light of the time constraints which the legislative and court schedules have imposed, I cannot conclude, as I must under the Voting Rights Act, that the proposed districts are entitled to Section 5 preclearance. Accordingly, I must, on behalf of the Attorney General, interpose an objection to the proposed redistricting plan for Congressional districts for the State of Alabama.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed Alabama Congressional redistricting plan has neither

the purpose nor will have the effect of denying or abridging theright to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the proposed Alabama Congressional redistricting plan continues to be legally unenforceable. *Clark v. Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

If you have any questions, feel free to call Voting Section attorney John Tanner (202-307-2897), who has been assigned to handle this matter.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

CIVIL ACTION NO. 91-0787

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL CHARLES WESCH,

Plaintiff,

MICHAEL FIGURES, et. al.,

Intervenor-Plaintiffs,

vs.

GUY HUNT, et al.,

Defendants.

ORDER

[Filed January 27, 1992]

Before COX, Circuit Judge, HAND, Senior District Judge, and ALBRITTON, District Judge

BY THE COURT

1. The court presently intends to adopt a redistricting plan to be used in the conduct of the 1992 congressional elections for the state of Alabama in the event the Alabama legislature fails to adopt and have precleared a constitutional redistricting plan in time for the conduct of those elections under the timetables presently provided for Alabama laws.

2. The plan that the court presently intends to adopt, to be called "The 1992 Alabama Redistricting Plan," is verbally

described in Appendix A to professor Stanley's report dated January 22, 1992. Appendix B to that report is a map depicting the plan. The map is appended simply to illustrate the plan and Appendix A shall control in the event of any conflict between it and Appendix B. Appendix C to that report includes certain statistical data. This report, including Appendices A, B, and C, is attached hereto (hereafter "the Stanley Report".

3. In considering a redistricting plan the court has relied upon certain statistical data obtained by Professor Stanley from the computer at the office of the Alabama Legislature (hereafter "the State Computer" that is contained in the Stanley Report. The court desires to give the parties an opportunity to question the accuracy of this data, and the purpose of this order is to provide that opportunity and to fix a time within which the parties shall assert any objections they may have to the accuracy of this data.

4. The statistical data provided by Professor Stanley from the State Computer that the court has relied upon is as follows: (a) the statistical data in Appendix A to the Stanley Report; and (b) the statistical data included in pages 1 through 9 of Appendix C to the Stanley Report.

It is ORDERED that:

A. Any party who questions the accuracy of any of the statistical data described in paragraph 4 of this order shall, on or before 5:00 P.M. on January 31, 1992, file and serve written objection asserting with particularity wherein such party finds such statistical data to be inaccurate, stating in the objection what figures such objecting party deems to be the correct figures.

B. In the event objections are filed, the court will at that time determine how to address them. In the absence of objection the court will assume: (1) that the statistical data described in paragraph 4 of this order was obtained from the State Computer and (2) that it is the most accurate data available on the subject.

C. It is not the intent of this order to invite or require objections to the redistricting plan described in Appendix A to the Stanley report but only to require objections relative to the accuracy of the statistical data upon which the plan is based.

D. The Clerk shall immediately notify all parties by telephone of the entry of this order.

All the judges concur.